

## Internal Revenue Service

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Department of the Treasury

Washington, DC 20224

Third Party Communication: None

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Person To Contact:

Telephone Number:

Refer Reply To:

CC:PSI:B04

PLR-142529-08

Date: MARCH 12, 2009

In Re:

### LEGEND:

Grantor	=
Son	=
Grandson	=
Granddaughter	=
Trust 1	=
Trust 2	=
Trust 3	=
Trust 4	=
Trust 5	=
Trust 6	=
Trust 7	=
Date 1	=
Date 2	=
Date 3	=
Date 4	=

Dear :

This letter responds to your September 30, 2008 letter and other correspondence requesting rulings regarding the estate and generation-skipping transfer (GST) tax consequences of a beneficiary's proposed exercise of a power of appointment over assets in several trusts.

The facts submitted are as follows:

On Date 1 (before September 25, 1985), Grantor established Trusts 2-6. On Date 2 (before September 25, 1985), Grantor established Trust 1. Trusts 1-6 are irrevocable. Trusts 1-6 are administered by Grantor's son, Son, in the capacity of a co-trustee, and an independent trustee. Grantor died on Date 3.

Trusts 1-4 provide that each trust will terminate at the death of Son. Trust 5 will terminate at the death of the later of Son and Grandson. Trust 6 will terminate at the death of the later of Son and Granddaughter.

Trusts 1-4 provide that upon the termination date, the trust estate is to be distributed to such persons, trusts, and/or corporations, in such shares, manner and proportions as Son may appoint by will. No power to appoint by will is to be exercised in favor of Son's estate, Son's creditors, or the creditors of Son's estate. Any such power of appointment is to be exercisable only by a separate clause in Son's will, which identifies the power by specific reference and disposes of no property other than the property subject to the power. Trust 5 provides similar language, except that Grandson is given the power to appoint and any portion of the trust assets not appointed by Grandson is to be appointed by Son, if Son survives Grandson. Trust 6 provides similar language, except that Granddaughter is given the power to appoint and any portion of the trust assets not appointed by Granddaughter is to be appointed by Son, if Son survives Granddaughter.

Trusts 1-4 provide that during the term of each trust, the income of such trust estate may be accumulated and retained, in whole or in part, or the independent trustee may distribute, from time to time, to any one or more of Son and his issue, such amounts as the independent trustee, in his sole discretion, decides are in the best interest of the beneficiary, taking into account the age of the beneficiary, the cost of the beneficiary's support, maintenance, and education, any income of the beneficiary and any other factors deemed relevant by the independent trustee. Trust 5 provides similar language for the benefit of Son, Grandson, and Grandson's issue. Trust 6 provides similar language for the benefit of Son, Granddaughter, and Granddaughter's issue.

Trusts 1-6 provide that no trust created or continued herein is to continue in force and effect for longer than 21 years after the last to die of Grantor and all of Grantor's issue living at the date of the execution of the respective Trust.

In Son's current will, Son exercises his powers of appointment over all the assets in Trusts 1-6 in favor of Son's surviving grandchildren in equal shares subject to the trusts created for them under Article 5 of Trust 7. If any of Son's grandchildren fail to survive him, then the share that grandchild would have received will pass to that

grandchild's surviving descendants subject to the trusts created for them under Article 6 of Trust 7.

Article 5 of Trust 7 establishes trusts for the benefit of the grandchildren of Son. During the life of the grandchild, the trustee will distribute to grandchild and any of his or her descendants so much of the income and principal as the trustee determines to be appropriate to provide for the continued health, maintenance, support, and education of the beneficiary. Upon the death of the grandchild, the grandchild has a general testamentary power of appointment over the GST taxable portion of the trust and a limited testamentary power of appointment over the remaining trust property. Article 6 of Trust 7 provides for similar trusts for other descendants of Son.

Paragraph 10.16 of Trust 7 provides, in relevant part, that any trust created or funded by Son's exercise of a limited power of appointment under a predecessor trust shall not postpone or suspend the vesting, absolute ownership or power of alienation of an interest in that property for a period, measured from the date of creation of the predecessor trust, extending beyond any life in being at the date of creation of the predecessor trust plus a period of 21 years plus, if necessary, a reasonable period of gestation, and the trustee shall distribute any property then held in the trust (i) to the beneficiary for whom the trust is named, if any, otherwise, (ii) per stirpes to the then living descendants of the named beneficiary, if any, otherwise, (iii) my grandchildren, subject to Article 5; otherwise, (iv) the trust estate shall be distributed as provided in Section 4.2.

You have requested the following rulings:

1. The property in Trusts 1-6 will not be includible in Son's gross estate for federal estate tax purposes.
2. Son's proposed exercise of the testamentary powers of appointment in Trusts 1-6 will not subject Trusts 1-6 or the property transferred from Trusts 1-6 to Trust 7 pursuant to Son's proposed exercise of the power of appointment to the GST tax.

#### Ruling 1

Section 2033 of the Internal Revenue Code provides that a decedent's gross estate shall include the value of all property to the extent of the decedent's interest at the time of death.

Section 2041(a)(2) provides for the inclusion in the gross estate of a decedent any property with respect to which the decedent possesses, at the time of his death, a general power of appointment created after October 21, 1942.

Section 2041(a)(3) provides for the inclusion in the gross estate of a decedent any property with respect to which the decedent by will exercises a power of appointment created after October 21, 1942, by creating another power of appointment which under the applicable local law can be validly exercised so as to postpone the vesting of any estate or interest in such property, or suspend the absolute ownership or power of alienation of such property, for a period ascertainable without regard to the date of the creation of the first power.

Section 2041(b)(1)(A) provides that the term "general power of appointment" means a power that is exercisable in favor of the decedent, decedent's estate, decedent's creditors, or the creditors of decedent's estate except that a power to consume, invade, or appropriate property for the benefit of the decedent that is limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent is not deemed a general power of appointment.

Section 20.2041-1(c)(1) of the Estate Tax Regulations provides that a power of appointment is not a general power of appointment if by its terms it is either (a) exercisable only in favor of one or more designated persons or classes other than the decedent or his creditors, or the decedent's estate or the creditors of his estate, or (b) expressly not exercisable in favor of the decedent or his creditors, or the creditors of decedent's estate.

In this case, each of the trusts, Trusts 1-6, grant Son a testamentary power of appointment which may not be exercised in favor of Son, Son's estate, Son's creditors, or the creditors of Son's estate. Therefore, Son's testamentary powers of appointment over Trusts 1-6 are not general powers of appointment. Accordingly, based upon the facts presented and representations made, we conclude that the exercise by Son of the limited powers of appointment will not cause the property transferred to be included in Son's gross estate under § 2041(a). Further, Son, as the co-trustee of the trusts, has no power to make distributions from Trusts 1-6 to himself. Accordingly, based on the facts submitted and representations made, we conclude that the property in Trusts 1-6 will not be includible in Son's gross estate for federal estate tax purposes.

## Ruling 2

Section 2601 imposes a tax on every generation-skipping transfer. The term "generation-skipping transfer" is defined in § 2611 as a taxable distribution, a taxable termination, or a direct skip.

Under § 1433(a) of the Tax Reform Act of 1986 (Act) and § 26.2601-1(a) of the Generation-Skipping Transfer (GST) Tax Regulations, the GST tax is generally applicable to generation-skipping transfers made after October 22, 1986. However, under § 1433(b)(2)(A) of the Act and § 26.2601-1(b)(1)(i), the GST tax does not apply to a transfer under a trust that was irrevocable on September 25, 1985, but only to the

extent that such transfer is not made out of corpus added to the trust after September 25, 1985 (or out of income attributable to corpus so added).

In this case, Trusts 1-6 are generation-skipping trusts because they provide for distributions to more than one generation of beneficiaries below the Grantor's generation. However, Date 1 and Date 2 are prior to September 25, 1985 and Trusts 1-6 were irrevocable on September 25, 1985. Therefore, Trusts 1-6 are exempt from the generation-skipping transfer (GST) tax under § 2601.

However, the rule under § 26.2601-1(b)(1)(i) does not apply to a transfer of property pursuant to the exercise, release, or lapse of a general power of appointment that is treated as a taxable transfer under chapter 11 or chapter 12. The transfer is made by the person holding the power at the time the exercise, release, or lapse of the power becomes effective, and is not considered a transfer under a trust that was irrevocable on September 25, 1985. In this case, Son's powers of appointment are testamentary and we concluded under Ruling 1 that Son's powers of appointment, which are not exercisable in favor of Son, Son's estate, Son's creditors, or the creditors of Son's estate, are not general powers of appointment under § 2041(a)(2). Therefore, the transfers of property from Trusts 1-6, pursuant to Son's exercise of his powers of appointment are not taxable transfers under chapter 11.

The exercise of a limited power of appointment will be treated as a post-September 25, 1985 transfer and, therefore, subject the property to chapter 13, unless (1) the power of appointment was created in an irrevocable trust that is not subject to chapter 13 under § 26.2601-1(b) and (2) in the case of an exercise, the power of appointment is not exercised in a manner that may postpone or suspend the vesting, absolute ownership or power of alienation of an interest in property for a period measured from the date of creation of the trust, extending beyond any life in being at the date of creation of the trust plus a period of 21 years plus, if necessary, a reasonable period of gestation (the perpetuities period). Section 26.2601-1(b)(1)(v)(B).

This rule is illustrated in Example 4 of § 26.2601-1(b)(1)(v)(D). In Example 4, on March 1, 1985, T established an irrevocable trust as defined in § 26.2601-1(b)(ii). Under the terms of the trust instrument, the trustee is required to distribute the entire income annually to T's child, C, for life, then to T's grandchild, GC, for life. GC has the power to appoint any or all of the trust assets to Trust 2 which is irrevocable trust (as defined in § 26.2601-1(b)(ii)) that was established on August 1, 1985. The terms of Trust 2's governing instrument provide that the trustee shall pay income to T's great grandchild, GGC, for life. Upon GGC's death, the remainder is to be paid to GGC's issue. GGC was alive on March 1, 1985, when Trust 1 was created. C died on April 1, 1986. On July 1, 1987, GC exercised the power of appointment. The exercise of GC's power does not subject future transfers from Trust 2 to tax under chapter 13 because the exercise of the power in favor of Trust 2 does not suspend the vesting, absolute ownership, or power of alienation of an interest in property for a period, measured from

the date of creation of Trust 1, extending beyond the life of GGC (a beneficiary under Trust 2 who was in being at the date of creation of Trust 1) plus a period of 21 years. The result would be the same if Trust 2 had been created after the effective date of chapter 13.

In this case, Son's testamentary limited power of appointment was created under Trusts 1-6, all of which are irrevocable trusts not subject to chapter 13 under § 26.2601-1(b). Therefore, the first requirement of § 26.2601-1(b)(1)(v)(B) is satisfied. The second requirement of § 26.2601-1(b)(1)(v)(B) is also satisfied in this case. Under Paragraph 10.16 of Trust 7, any trust created or funded by Son's exercise of the limited powers of appointment under Trusts 1-6 must not postpone or suspend the vesting, absolute ownership or power of alienation of an interest in that property for a period, measured from the date of creation of Trusts 1-6, extending beyond any life in being at the date of creation of Trusts 1-6 plus a period of 21 years plus, if necessary, a reasonable period of gestation). Therefore, Son's powers of appointment cannot be exercised in a manner that may postpone or suspend the vesting beyond the perpetuities period in Trusts 1-6. Accordingly, based on the facts submitted and representations made, we conclude that Son's proposed exercise of the limited testamentary powers of appointment in Trusts 1-6 will not subject Trusts 1-6 and the property transferred from Trusts 1-6 to Trust 7, pursuant to the exercise, to the GST tax.

The last sentence in Example 4 states that the result would be the same if Trust 2 had been created after the effective date of chapter 13. In this case, Trust 7 was created on Date 4, a date after the effective date of chapter 13. The conclusion above does not change. However, we note that Trust 7 will have a non-chapter 13 portion, the assets transferred from Trusts 1-6 pursuant to Son's exercise of his power of appointment, and a chapter 13 portion, the other assets in Trust 7. The inclusion ratio for the non-chapter 13 portion is deemed to be 0. The inclusion ratio for the chapter 13 portion of Trust 7 is dependent upon whether Son allocates his available GST exemption to those assets.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. Specifically, we are not opining on whether assets transferred to Trust 7, other than those transferred pursuant to Son's exercise of his powers of appointment, are includible in Son's gross estate and whether these assets are exempt from GST tax.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the

material submitted in support of the request for rulings, it is subject to verification on examination.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of provides that it may not be used or cited as precedent.

Sincerely,

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Lorraine E. Gardner  
Senior Counsel, Branch 4  
Office of the Associate Chief Counsel  
(Passthroughs and Special Industries)

Enclosure:

Copy of letter for § 6110 purposes